No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the East Bay Municipal Utility District, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

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STATUTES.

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STATEMENT OF THE CASE.

Preliminary Statement of Facts.

The East Bay Municipal Utility District is a municipal utility district of the State of California organized pursuant to the provisions of an act entitled "An Act to Provide for the Organization, Incorporation and Government of Municipal Utility Districts, Authorizing Such Districts to Incur Bonded Indebtedness for the Acquisition and Construction of Works

and Property, and to Levy and Collect Taxes to Pay the Principal and Interest Thereon," approved May 23, 1921. (*Stat. 1921,* p. 245.) It contains within its corporate limits nine cities on the easterly side of San Francisco Bay, consisting of the Cities of Oakland, Alameda, Berkeley, San Leandro, Emeryville, Piedmont and Albany in the County of Alameda and of Richmond and El Cerrito in the County of Contra Costa. It contains no other territory. These nine cities through the instrumentality of the District are at present engaged in bringing to their inhabitants a muchly needed water supply from a distant source. For this purpose bonds were authorized by the voters of the District to the extent of $39,000,000. The validity of this bond issue has been approved by the Supreme Court of the State. *(In Re Validation of the East Bay Municipal Utility District Bonds, etc.,* 70 Cal. Dec. 270.) $10,000,000.00 worth of these bonds have been sold and blocks are being sold from time to time as the construction work of the District progresses and requires money for its payment. Contracts in excess of $17,000,000.00 have been let and because of the grave situation surrounding the District with respect to its water supply the work has been pushed with the utmost dispatch.

The necessities of the District for an additional water supply are unquestioned. The local supply beside being unsatisfactory is insufficient. In fact, at the present time there is less than a two months' supply in the reservoirs. A forced pumping of the wells which form a part of the supply (caused by this scarcity) has resulted in some of these wells becoming

salty (these wells are situate in the southeasterly part of Alameda County and close to the shore of San Francisco Bay), and if the following season should be a dry one the 450,000 people in the District will be in dire straits for water. This and other facts appear from the affidavit of Geo. C. Pardee, president of the District. (Tr. pp. 19-24.) This affidavit may be considered on motion to dismiss. *(Miller v. Min. Separation, Ltd.,* 275 Fed. 380.)

It also is the fact that the public utility at present supplying the District with water from local sources recognized the inadequacy of its supply and within two years petitioned the Railroad Commission of the State of California to permit it to issue securities to bring in a distant supply, which request was only refused because this utility District had been organized, had voted its bonds and promised in said proceeding to bring in such distant supply with all the resources within its power. (Aff. Geo. C. Pardee, Tr. pp. 21-23.)

Accordingly, the District after engineering studies by a board of engineers, consisting of General George W. Goethals, builder of the Panama Canal, William Mulholland, chief engineer and in charge of the Los Angeles water supply, and Arthur P. Davis, the present chief engineer of the District and former head of the United States Reclamation Service, selected the Mokelumne River as a source of supply and also selected a reservoir site on said river near Lancha Plana as the place for storing, impounding and diverting said waters.

While the bond issue of the District was before the courts for validation and so as to lose no time the District proceeded to call for bids for the building of its project. These bids were received before the bonds were validated. Immediately upon the validation decision contracts were let for the work.

The aqueduct lines of the District run in a southeasterly direction from the center of the City of Oakland to the said Lancha Plana reservoir in the foothills of the Sierras. They will cross several branches of the San Joaquin River in the delta region in the vicinity of Stockton. The call for bids divided the work into ten schedules. The contracts for all schedules west of the San Joaquin River were immediately let and because of the exigencies of the occasion contained liberal bonus clauses, giving the contractors a bonus for speedy completion. The contracts east of the river were let conditionally, that is to say, they contain clauses permitting their cancellation within certain times in the event the District deemed it expedient. The purpose of rushing the work to the San Joaquin River was so that in the event of a dry year an emergency supply might be pumped to the District from that source. While the quality of the San Joaquin water is not all that might be desired, it can by a proper treatment be made available for temporary use until the line is completed to the purer water of the Mokelumne. The bonds were only validated in September, 1925. Since that time the District has secured all of its right of way between Oakland and the San Joaquin River (more than forty-seven miles), and the construction of that portion of

its project is expected to be completed by approximately April or May, 1927; many miles of right of way east of the river have also been secured.

In September, 1925, and at the time of the letting of these contracts the District had pending and undetermined applications for certain necessary permits from the State and Federal Governments. These were as follows:

> (a) An application before the Division of Water Rights of the State of California for permission to divert the waters of the Mokelumne in order to supply 200,000,000 gallons daily to the District;
>
> (b) An application with the War Department of the United States to permit its aqueduct lines to cross certain navigable streams in the delta region; and, lastly,
>
> (c) An application before the Federal Power Commission in order that it might build its dam on and also inundate certain lands belonging to the United States in its proposed reservoir site.

Because in September, 1925, these permits had not yet been acted upon the board of directors of the District deemed it expedient not to obligate themselves to construct the project beyond the San Joaquin River. Therefore, all contracts beyond the San Joaquin River contained the clauses hereinbefore mentioned, permitting the District to cancel same without cost to it.

The appellant, S. D. Pine, sues as a citizen and taxpayer of the District. His original bill herein was filed September 25, 1925. This was some time after the bids had been received for the construction of the

District's project and on the day that the board of directors of the District met for the purpose of awarding the contracts; no preliminary injunction was asked for and none was issued. In the original bill and also in the amended bill appellant with great particularity alleged the failure of the District to secure *any* of these permits and alleged the failure of the issuance of any *of these permits* as a reason why the directors should be enjoined from letting any contracts. In addition to the District itself, its officers and directors and certain of the parties who had bid on the project were made defendants. Since this litigation has been pending *all* of the permits above specified have been granted; the Division of Water Rights of the State of California granting a permit for the water rights on April 17, 1926; the War Department of the United States granting a permit to construct the aqueduct lines beneath the navigable waters of the United States on March 4, 1926; and the Federal Power Commission granting a permit to use the Lancha Plana dam site and reservoir lands on June 24, 1926.

Statement of Issues.

To the original bill the defendant District and its officers alone appeared. They filed a motion to dismiss on grounds hereinafter alleged. The appellant made a motion to file an amended and supplemental bill. The motion to dismiss the original bill and the motion to file the amended and supplemental bill were heard together. The motion to dismiss was granted and judgment entered accordingly. The motion to file the amended and supplemental bill was denied.

The same considerations which required the dismissal of the original bill also required the denial of the motion to file the amended and supplemental pleading.

The granting of these various permits necessarily restricted the scope of appellant's attack on the actions of the District. His sole complaint now seems to be the legality of the District's action in taking a permit from the Federal Power Commission. While his contentions are stated in a variety of ways and with great detail the question really narrows down to this: Under its Organic Act can the East Bay Municipal Utility District apply for and accept a permit from the Federal Power Commission under the Federal Water Power Act?

As a preliminary to this consideration on the merits two questions of jurisdiction arise, (1) does the matter in controversy exceed the sum of $3,000.00? (2) does the matter in controversy arise under the Constitution and laws of the United States? As these matters each go directly to the jurisdiction of this court we will in our argument discuss them in the order named. We will also divide our argument into a third heading, viz.: That the facts pleaded do not constitute a valid claim in equity and that the bill falls short in stating a cause of action entitling the appellant to any relief at the hands of the court.

ARGUMENT.

I.

THE MATTER IN CONTROVERSY DOES NOT EXCEED THE SUM OF $3000.00.

Preliminary Statement.

Section 24 of the Judicial Code reads as follows:

> "The District Courts of the United States shall have original jurisdiction as follows: * * * Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (a) arises under the Constitution or laws of the United States * * *"

The jurisdiction of the District Court is not claimed on diversity of citizenship. In order to confer jurisdiction there must not only be a federal question (i. e., one arising under the Constitution and laws of the United States), *but the matter in controversy* must exceed the sum of $3,000.00.

> *Shewalter v. City of Lexington,* 134 Fed. 161;
> *Judicial Code,* Sec. 24.

The federal courts are of limited jurisdiction. There is no presumption in favor of jurisdiction. On the contrary it will be presumed such courts are without jurisdiction unless the same clearly appears. Justice Harlan of the Supreme Court of the United States, sitting in the Circuit Court for this District, in

> *United States v. Southern Pacific R. R. Co.,*
> 49 Fed. 293, 300,

said:

> "The first point made by the defendants is that the Circuit Courts of the United States possess no powers except such as the Constitution and the acts of Congress concur in conferring upon

them, and that the legal presumption is that every cause is without their jurisdiction *until and unless the contrary affirmatively appears. No doubt can exist as to the correctness of this principle.* (Citing cases.)" (Emphasis ours.)

To the same effect:

Shade v. Northern Pacific Ry. Co., 206 Fed. 353, 355 (citing many cases);

Farmers, etc. Bank v. Federal Reserve Bank, 274 Fed. 235;

Cleveland, etc. Co. v. Village of Kinney, 262 Fed. 980;

Byers v. McAuley, 149 U. S. 608; 37 L. Ed. 867.

The Amount in Controversy in a Suit of This Character Brought by a Taxpayer is the Amount of Taxes the Appellant Will Be Required to Pay if the Alleged Wrongful Act Be Not Enjoined.

Appellant sues as a taxpayer. (Par. II of his bill, Tr. p. 2; Par. II amended bill, Tr. p. 31.) In Paragraphs II and III of his amended bill he alleges the value of all his property and the assessed value of all the property in the District. Even if the entire $39,000,000.00 of the bond issue were misapplied the amount of his taxes for the entire issue over the entire life of the bonds will not amount to $3,000.00. This is admitted. (Appellant's Opening Brief, p. 56, lines 6-8.) In fact if the court cares to go into the mathematical calculation the ratio of his property to all that in the District is such that if the entire $39,000,000.00 were wasted his taxation will amount to about $275.00. To date his taxation for District purposes has been less than $5.00. (Par. II, Amended Bill.)

Under such circumstances the federal courts have uniformly held that in a suit to enjoin a threatened act on the part of a public body by a taxpayer *the amount in controversy is the pecuniary loss to him by the alleged illegal action sought to be enjoined.*

The court's attention is called to the following cases which fully sustain our contentions: In

Adams v. Douglas Co. (Cir. Ct. Dist. Kansas, 1868), 1 Fed. Cas. 106,

the court said:

> "We do not see how any other test of jurisdiction can be maintained, than that when more than five hundred dollars are required as the basis of jurisdiction, *it must mean an amount exceeding five hundred dollars which the plaintiff is liable to lose or gain by the result of the suit.* It could never have been intended by the act of Congress, that because a subject matter may have been involved in the proceeding, worth more than five hundred dollars, therefore any non-resident may have brought his suit in the Circuit Court, even though his own interest may have been a very small amount of the item of property. The result of such a doctrine would be, or might be, to throng these courts with proceedings in which a mere trifle might be claimed by the complainant, simply because that trifle comprised a part,—a small part,—of some large interest. A single stockholder in a banking or any other corporation, to the amount of fifty dollars, might thus gain in the Circuit Court a foothold for litigation, merely because the capital stock was a million. * * * *We understand the act of Congress to mean not that the party must litigate in reference to something more than five hundred dollars, but that he must bring into court, to be adjudicated by it, an interest exceeding five hundred dollars in something, which interest he shall claim to*

have as against his adversary, or, in case of injunction, which interest his adversary is about to put in jeopardy by his action, against which he invokes the protection of the courts. This doctrine, besides being well established by the course of decisions in the Supreme Court (see Green v. Liter), 8 Cranch (12 U. S.), 229; (Gordon v. Longest), 16 Pet. (41 U. S.) 97; (Childress v. Emory), 8 Wheat. (21 U. S.) 142), was recognized at a recent term of the Circuit Court for this district, Judge Miller presiding, when, in the case of Jewett v. Treasurer of Leavenworth County (Case No. 7312), the suit was dismissed because it did not appear that, in a proceeding to enjoin the treasurer, the plaintiff's tax exceeded five hundred dollars." (Emphasis ours.)

While this is an early case later decisions reaffirm the rule. A late case very much in point is

Scott v. Frazier, 258 Fed. 669.

The complainants brought suit to restrain defendants, who were public officers of the State of North Dakota, *from paying out public funds in the state treasury amounting to several hundred thousand dollars, from issuing bonds of the state for a much larger sum* and to have certain amendments to the state constitution and statutes declared null and void. The claim was specifically made in that litigation that the suit was brought not only upon the part of complainants *but on the part of all other taxpayers of the state.* The following extracts from the opinion prove this point:

On page 671 the court says:

"They (complainants) assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds and an un-

constitutional issue of its bonds. *That being the nature of the suit, it is claimed that the entire fund is the amount in controversy, and not the right of possible damage of the plaintiffs.*"

The court then goes on to say, page 672,

"In suits to enjoin a threatened tax levy, and that is the nature of the suit here, in all its aspects, *the authorities are uniform that the individual plaintiffs cannot aggregate their interests* for the purpose of making up the $3,000.00. Wheless v. City of St. Louis (C. C.), 96 Fed. 865; same case, 180 U. S. 379, 21 Sup. Ct. 402, 45 Law Ed. 583; Rogers v. Hennepin Co., 239 U. S. 621, 36 Sup. Ct. 217, 60 Law Ed. 469." (Emphasis ours.)

The bill was dismissed.

This case was appealed to the Supreme Court of the United States and the judgment of the lower court was upheld in an opinion containing the following language:

"the jurisdiction was invoked because of alleged violation of rights under the 14th Amendment. The complainants were taxpayers of North Dakota who alleged that suit was brought on behalf of themselves and all other taxpayers of the state. There was no diversity of citizenship, and jurisdiction was rested solely upon the alleged violation of constitutional rights. The District Court rendered a decree dismissing the bill on the merits, the judge stating that he was of opinion that there was no jurisdiction, and directing the dismissal on the merits to prevent delay, and to permit the suit being brought here by a single appeal.

"*There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00.* It is well settled that in such cases as

this the amount in controversy must equal the jurisdictional sum as to each complainant. Wheless v. St. Louis, 180 U. S. 379, 45 L. Ed. 583, 21 Sup. Ct. Rep. 402; Rogers v. Hennepin County, 239 U. S. 621, 60 L. Ed. 469, 36 Sup. Ct. Rep. 217." (Emphasis ours.)

Scott v. Frazier, 253 U. S. 243, 244; 64 L. Ed. 883, 887.

Another decision of the Supreme Court of the United States dealing with this subject is

Colvin v. City of Jacksonville, 158 U. S. 456, 39 L. Ed. 1053.

The facts in that case are in point with those of the instant case. The suit was to enjoin the issue, sale and delivery of bonds. Just as in this case the suit is to enjoin the performance of a contract. *The complainant in that case claimed that the sale of the bonds would damage him and that the amount in controversy was the entire bond issue.* In this case complainant claims that performance of the contract will cause damage to himself (as well as to others) and that the amount of controversy is the sum of the contracts sought to be voided and annulled. In the *Colvin* case the court distinctly said it was the damage complainant would suffer which was the criterion of jurisdiction and dismissed the bill. The syllabus correctly stating the holding of the court is as follows:

"In a suit by a taxpayer to restrain the issue of municipal bonds, *the amount of taxes which plaintiff would have to pay, and not the entire issue of the bonds,* is the extent of his interest and the amount in controversy, and if that does not exceed $2,000.00, the Circuit Court has no jurisdiction."

In

Wheless v. St. Louis, 180 U. S. 379, 382; 45 L. Ed. 583, 585,

the suit was to restrain the city from levying or assessing the cost and expenses of improving a public street upon complainant's property. The decision turned upon the question of whether the matter in controversy exceeded $2,000.00, the then statutory amount. In the course of its opinion the court said:

> "The 'matter in dispute' within the meaning of the statute is not the principle involved, *but the pecuniary consequence to the individual party, dependent on the litigation;* as, for instance, in this suit the amount of the assessment levied or which may be levied, as against each of the complainants separately * * *. When made, neither one of these complainants will be called upon to pay a sum equal to the amount of $2,000.00 nor will any one of the lots be assessed to that amount." (Emphasis ours.)

In

Cowell v. City Water Supply Co., 121 Fed. 53,

it appears that the complainant brought suit "on behalf of himself and on behalf of all others of the same class" to declare certain corporate stock and certain mortgages void, but the court held that if his individual interest did not amount to the statutory sum it had no jurisdiction.

In

Risley v. City of Utica, 168 Fed. 737,

the court ruled that the matter in dispute was not the entire value of complainant's farm but the amount

of tax he would have to pay under an unauthorized tax levy by the city.

In

Walter v. Northeastern R. R. Co., 147 U. S. 370; 37 L. Ed. 206,

the holding of the court is correctly stated in the syllabus as follows:

> "The United States District Court has no jurisdiction of a suit in equity brought to enjoin the treasurers and sheriffs of several counties from issuing executions against or seizing the property of plaintiff for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void, where the amount in dispute in each county is less than $2,000.00."

The following cases are also very much in point:

Citizens Bank v. Cannon, 164 U. S. 319; 41 L. Ed. 451;

Northern Pacific R. R. Co. v. Walker, 148 U. S. 391; 37 L. Ed. 494;

Rogers v. Hennepin Co., 239 U. S. 621; 60 L. Ed. 469;

Fishback v. Western Union Tel. Co., 161 U. S. 96; 40 L. Ed. 630;

Elgin v. Marshall, 106 U. S. 578, 582; 27 L. Ed. 249;

Holt v. Indiana Mfg. Co., 176 U. S. 68; 44 L. Ed. 374;

Lion Bonding Co. v. Karatz, 262 U. S. 77, 85; 67 L. Ed. 871, 878.

It has also been held that the right in dispute must be measured in terms of money. If it be a right

which cannot be measured in terms of money, regardless of how important a right it may be, the federal courts have not jurisdiction.

Whitney v. American Shipbuilding Co., 197 Fed. 777;

Oregon R. R. and Navigation Co. v. Shell, 125 Fed. 979.

In

Holt v. Indiana Manufacturing Co., 176 U. S. 68; 44 L. Ed. 374, 377,

in connection with a case in principle similar to the one at bar the Supreme Court of the United States, speaking through Chief Justice Fuller, said:

> "Treating this bill as setting up a case arising under the Constitution or laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subjected to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, or for any other reason, the difficulty is that the pecuniary limitation of over $2,000.00 applied; and the taxes in question did not reach that amount. *And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute.* New England Mortg. Security Co. v. Gay, 145 U. S. 123, 36 L. Ed. 646, 12 Sup. Ct. Rep. 815; Clay Center v. Farmers' Loan & T. Co., 145 U. S. 224, 36 L. Ed. 685, 12 Sup. Ct. Rep. 817; Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. Ed. 451, 17 Sup. Ct. Rep. 89." (Emphasis ours.)

Answering Appellant's Argument on This Point. (App. Br. pp. 55-71.)

Appellant discusses this proposition in Sub. IX of his brief, pages 55-71. He seeks to escape the force of these decisions by claiming he is suing on behalf of *all* taxpayers similarly situated and for and on behalf of the District itself. (Amended Bill, Par. XXII, Tr. pp. 48-9.) That same allegation was made and asserted in *Scott v. Frazier, Cowell v. City Water Supply Co., Lion Bonding Company v. Karatz* and other cases heretofore cited by us. The answers made by the courts to similar contentions in these cases seem conclusive of the issue.

Appellant also relies on the case of *Brown v. Trousdale,* 138 U. S. 389. The court in the *Trousdale* case apparently considered that the aggregate amount of taxes which the litigant would be required to pay over a long course of years would exceed the statutory amount, and did not limit the jurisdictional amount to the tax for a single year. Even tested by this rule jurisdiction is not present in the instant case because it is admitted that in no event will the taxes that appellant is required to pay amount to the jurisdictional sum. (App. Br. p. 56, lines 6-8.) Regardless of what comfort appellant may secure from the *Trousdale* case that case was called to the attention of the court in the case of *Scott v. Frazier,* 253 U. S. 244; 64 L. Ed. 883, as appears from the report of that case in the Lawyer's Edition. Apparently the Supreme Court was not impressed because it did not cite the *Trousdale* case in its opinion and it reaffirmed the rule that jurisdiction depended upon the amount the

taxpayer must pay even though *his bill alleged he was suing on behalf of himself, others similarly situated and the public corporation of which he was a part.*

We have no quarrel with the California cases cited by appellant in this part of his brief. No question of jurisdictional amount such as is necessary in the federal courts is involved. The Superior Court of the State has jurisdiction in all equity cases, regardless of the amount involved. All that those authorities decide is that in a proper case a taxpayer may bring such suit. They are not controlling, however, upon the precise point before this court, because the value of the matter in controversy is not a condition precedent to jurisdiction.

The cases cited with reference to the right of a stockholder in a private corporation to begin a suit which should have been brought by the corporation itself upon the latter's refusal to act are clearly distinguishable. There a much different situation presents itself. Regardless of what the rule may be with reference to private corporations under such circumstances, the fact remains that by an unbroken line of decisions the Supreme Court of the United States and the other federal courts have universally made the interest of the individual taxpayer the test of jurisdiction in suits such as the one now before the court.

II.

THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

Preliminary Statement.

All questions in this case were fully briefed in the court below. Each party therefore has the benefit of the position taken by the other. Appellant's theory in the court below and in his pleadings was that a federal question was raised because of the *non-existence* at that time of the permits later granted the District by the War Department to cross the navigable waters of the United States and by the Federal Power Commission to use the federal lands. The granting of these compelled a shift in his position. He now insists a federal question is before the court because of the claim that the District under its Organic Act cannot legally take a license from the Federal Power Commission. This manifestly is a matter of state and not federal concern. The decision, that is to say, the ultimate rights of the parties, will depend upon the state enactment and not upon the federal statute. The rights and limitations of the District are fixed by its Organic Act and by no federal legislation. The federal statute is only collaterally involved.

The Alleged Maladministration of the Affairs of the District Does Not Raise a Federal Question.

The grievance of the appellant is that there is a maladministration of the affairs of the District. He sued to prevent the officers of the District from letting certain contracts which in his opinion (but contrary

to the opinion of the board of directors of the District) will result in loss to the District and incidentally to himself as a taxpayer. His original object was and still must be to prevent the District from prosecuting this work on the ground that the actions of the board are not for the best interests of the District. These facts do not raise a federal question. There is no provision of the federal Constitution or of the federal law which protects a citizen, resident and taxpayer against maladministration by the duly elected public officials of a state political subdivision in the discharge of the duties conferred upon them by state law. His rights as a taxpayer and otherwise in this litigation do not arise *under* or depend *upon* the Constitution or laws of the United States. This is perfectly apparent from the bill itself. For example, he alleges that no permit has been received from the state government. Presumably the dire consequences that will flow from a lack of the permit from the federal government would also follow the lack of the permit from the state government, had it been denied. Yet if the lack of the state permit were the *sole* ground of plaintiff's grievance, there could not be the slightest contention that a federal question was raised. Does the allegation of absence of the federal permits or claimed inability to comply with a federal law raise a federal question? How can it? The absence of any permit affects him in the same way, and to the same extent. His right is the same in each case. His remedy is the same in each case; both his right and remedy depend upon the powers which the state law gives to the directors of the

municipality, and on no federal statute. He is suing, not for the right which is *dependent* upon any law of the United States, *but to be protected against the maladministration of the affairs of the District.* The absence of the federal permits does not make the matter a federal question. If there be maladministration it would be present whether caused by the absence of federal permits or state permits, or for any other cause. It would be just as painful for the taxpayer of the District to be taxed uselessly because of the lack of the state permit as it would be to be taxed because of the lack of the federal permit. Yet manifestly in the one case the federal court would not have jurisdiction; how can it have it in the other, when in both cases the remedy sought is the same and the rights of the parties are the same, and in neither case would the ultimate relief depend upon the Constitution or laws of the United States?

A case in our opinion decisive on the issues herein is that of

Owensboro Water Works Company v. City of Owensboro, 200 U. S. 38; 50 Law. Ed. 361.

In that case, as in the instant case, the complainant sought the aid of the federal courts to enjoin an official act of the city. The bill was dismissed on the ground that there was no federal question. The complainant contended that certain public funds were being used for an unlawful purpose, that is to say, they had been voted for one purpose and were being used for another, and it sought to enjoin the sale of bonds and the use of this money, contending that as

a taxpayer it was being deprived of property without due process of law. In the course of its opinion, the United States Supreme Court said:

> "The bill presents the case of the diversion, or the intended diversion, by a municipal corporation, of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, which funds were not applied to the object for which they were raised, and which failure of duty on the part of the corporation so to apply them may ultimately cause increased taxation if the full amount originally intended to be applied to the particular object named by the legislature is to be collected.
>
> We share with the court below the difficulty in understanding how such a case can be regarded as one arising under the Constitution of the United States."

It is not every case where the federal law is collaterally involved that presents a federal question. The state courts are not prohibited from construing acts of Congress or the Constitution. It has been held

> "that a case cannot be removed from a state court simply because in the progress of the litigation it may become necessary to give a construction to the Constitution and laws of the United States."
>
> *State of Tennessee v. Union & Planters Bank,* 152 U. S. 454; 38 Law. Ed. 511, 514.

To the same effect:

> *Little York Gold, etc. Co. v. Keyes,* 96 U. S. 199; 24 Law. Ed. 656.

The right of the party must depend upon the federal law. If the federal matter is merely collateral

to the issue, then the court has no jurisdiction. This is aptly illustrated by the case of

Norton v. Whiteside, 239 U. S. 144; 60 Law. Ed. 239.

The opinion in this case is too long to be quoted herein, but the case is very much in point with the instant case. In that case the complainants sought to do substantially the same thing the complainant seeks to do in this case. The claim was made that the federal courts had jurisdiction because the action arose under the Constitution and laws of the United States. On its face the bill so stated. The court held, however, that this was not sufficient, saying:

> "This, however, does not suffice to solve the question, since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States, but that it must appear that 'it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading.' "

While the bill made reference to many federal statutes which it was claimed set up the federal question *(just as does this appellant),* in a well reasoned opinion by Chief Justice White, the court shows that such matters were only collaterally involved; that the rights of the parties really depended upon the proper construction of the riparian law applicable to the controversy; that this was a state and not a federal matter; *that the acts of Congress with reference to*

navigation and similar matters relied on were purely incidental to the main controversy. Similarly, in this case the complainant's rights depend not upon any federal law, but upon the laws of the State of California with reference to the protection that a citizen and taxpayer has against alleged abuse of authority by duly elected officials of a municipality.

Blumenstock Bros. etc. v. Curtis Publishing Co., 252 U. S. 436; 64 Law. Ed. 649,

is another case in which the federal question, viz., the effect of the commerce clause, was only collaterally involved. The court held that the mere incidental relation to interestate commerce of the transactions narrated in the complaint was not enough to raise the federal question. For brevity, we quote in part from the syllabus only:

> "In any case alleged to come within the federal jurisdiction, it is not enough to allege that questions of a federal character arise in the case, but it must plainly appear that the averments attempting to bring the case within such jurisdiction are real and substantial."

In

Newburyport Water Co. v. Newburyport, 193 U. S. 562; 48 Law. Ed. 795, 799,

the Supreme Court of the United States defines its attitude upon this matter as follows:

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. *On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears*

> *that such averment is not real and substantial, but is without color of merit."* (Citing many cases.) (Emphasis ours.)

In another case,

> *Hamblin v. Western Land Co.,* 147 U. S. 531; 37 Law. Ed. 267,

with reference to the subject matter under discussion, the court said:

> "It is doubtful whether there is a federal question in this case. A real and not a fictitious federal question is essential to the jurisdiction of this court over the judgments of state courts."

In *Austin v. Gagan,* 39 Fed. 626 (Cir. Ct. N. D. Cal.), it was held that the record must show some disputed construction of a federal statute in order to confer jurisdiction. Where the federal law is undisputed, jurisdiction does not attach.

In *Theurkauf v. Ireland,* 27 Fed. 769, 770 (Cir. Ct. N. D. Cal.), the court said:

> "But it does not appear that there is any disputed construction of any statute of the United States involved. It does not appear but that both parties agree upon the construction of the preemption laws * * *. There is nothing to show that any disputed question will arise, and this must affirmatively be shown in order to make it affirmatively appear that the court has jurisdiction."

To the same effect, see:

> *California Oil & Gas Co. v. Miller,* 96 Fed. 12;
> *Crystal Springs etc. Co. v. City of Los Angeles,* 76 Fed. 148.

Answering Appellant's Argument on This Point. (App. Br. pp. 71-83.)

Appellant deals with this question in Sub. X of his brief, pp. 71-83. No attempt is made to answer the authority we have cited. It is merely mentioned without discussion. He relies entirely upon the fact—*not disputed*—that because the Federal Water Power Act permits the federal government to take over the project at the end of fifty years *with compensation* (Sec. 14, Federal Water Power Act; 41 Stat. at Large, p. 1063) that this fact, coupled with his claim that the District cannot take the license with these provisions, raises the federal question. We submit the very statement of the matter shows the non-existence of any federal question. That the Federal Water Power Act permits this recapture no one disputes. To determine whether or not the defendant District may legally ask for such license and accept same from the Federal Power Commission, must be determined by construction of the Organic Act of the District, and the laws of the State of California. There is no federal statute attempting to define the powers of such a District. It is entirely a matter of state concern.

The United States Supreme Court in dealing with a case where reference was made to a federal statute, and where jurisdiction was sought to be upheld on the ground that a federal question was involved, stated the rule thusly:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily or for that reason alone one arising under those laws, for a suit does not so arise unless it really

and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law *upon the determination of which the result depends.*" (Emphasis ours.)

Shulthis v. McDougal, 225 U. S. 561, 569; 56 L. Ed. 1205, 1211.

Many cases are cited in the opinion last quoted to the same effect.

See, also,

Bankers etc. Co. v. Minneapolis etc. Co., 192 U. S. 372, 381; 48 L. Ed. 484, 488.

In a recent case, the Supreme Court again said:

"The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below." (Citing cases.)

Corrigan v. Buckley. (U. S. Sup. Ct. Advance Opinions decided May 24, 1926.)

The right of the District to accept such license and its powers in the premises depend upon the laws of the State of California; hence the controversy does not arise "under the Constitution or laws of the United States."

III.

THE FACTS ALLEGED DO NOT CONSTITUTE A VALID CLAIM IN EQUITY.

The District Has Complete Power to Do All Lawful Things Necessary or Convenient to Carry Out Its Purposes.

The District's Organic Act is found in Statutes of the State of California of 1921, page 245. The pertinent provisions are as follows:

> Section 4. "The government of every municipal utility district so created and established shall be vested in a board of five directors, * * *"
>
> Section 11. "The board of directors shall constitute the legislative body of said district and shall determine all questions of policy * * * The board of directors shall supervise and regulate every utility owned and operated by the district, including the fixing of rates, rentals, charges and classifications, and the making and enforcement of rules, regulations, *contracts,* practices and schedules, for and in connection with any service, product or commodity owned or controlled by said district."
>
> Section 12. "Any municipal utility district incorporated as herein provided shall have power: * * * * * * * *
>
> FOURTH. To take by grant, purchase, gift, devise, *or lease, or otherwise acquire,* and to hold and enjoy, *and to lease* or dispose of, real and personal property of every kind within or without the district, necessary to the full or convenient exercise of its powers.
>
> FIFTH. To *acquire,* construct, own, operate, control *or use,* within or without, or partly within and partly without, the district, *works for supplying the inhabitants of said district* and municipalities therein, without preference to such municipalities, *with light, water, power,* heat, transportation, telephone service, or other means of communication, or means for the

disposition of garbage, sewage, or refuse matter; *and to do all things necessary or convenient to the full exercise of the powers herein granted;* also to purchase any of the commodities or services aforementioned from any other utility district, municipality or private company, and distribute the same * * *."

"SIXTH. To have or exercise the right of eminent domain in the manner provided by law for the condemnation of private property for public use. To take any property necessary or convenient to the exercise of the powers herein granted, whether such property be already devoted to the same use or otherwise. In the proceedings relative to the exercise of such right the district shall have the same rights, powers and privileges as a municipal corporation.

SEVENTH. To construct works across or along any street or public highway, or over any of the lands which are now or may be the property of this state, and to have the same rights and privileges appertaining thereto as have been or may be granted to the municipalities within the state, and to construct its works across any stream of water or water course. The district shall restore any such street or highway to its former state as near as may be, and shall not use the same in a manner to unnecessarily impair its usefulness."

* * * * * * * *

"TENTH. *To make contracts,* to employ labor, *and to do all acts necessary and convenient for the full exercise of the powers herein in this act granted."*

Section 26. "All matters and things necessary for the proper administration of the affairs of said district which are not provided for in this act shall be provided for by the board of directors of the district by ordinance."

The statutes above quoted state the power and authority of the board of directors of the defendant

District. Clearly the acts sought to be enjoined are within the powers and authority granted by the provisions of law above quoted.

The pertinent provisions of the Federal Water Power Act (41 Stats. at Large, p. 1063) are as follows: In Section 3 of the Act the term "municipality" is defined

> "a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power".

The term "municipal purposes" is defined as

> "all purposes within municipal powers, as defined by the Constitution or laws of the State, or by the charter of the municipality".

Section 4, subdivision (d) of the same Act, in defining the powers of the Commission, in so far as material, is as follows:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State *or municipality* for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories) or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided."

Section 6 provides that licenses shall be issued for a period not exceeding fifty years. Section 14 provides that at the expiration of the license period the Government may take over the works upon making full compensation to the licensee and giving two years' notice. Under Section 15 of the Act the Commission is given power to renew the license.

There is no question but that the Commission has the right to issue this license. There is nothing stated in the bill nor in the amended bill to show any lack of such power. The claim of the appellant is that the District has not the power to accept such a license. (This, as we have shown in the previous subdivision of the brief, is not a matter arising under the constitution or laws of the United States.) The quotations from the Organic Act of the District show the fallacy of such contention. The license from the United States is a contract. (*Alabama Power Co. v. Gulf Power Co.,* 283 Fed. 606, 615.) Certainly in securing from the Federal Power Commission the use of federal lands for the purpose of supplying water, heat and power for fifty years to its inhabitants the District is performing an act in line with the powers conferred upon it by law. The District is given full power "to take by grant * * * lease or otherwise acquire * * * property * * * necessary to the full *or convenient* exercise of its powers". (Sec. 12, sub. 4.) It is also given full power to acquire works for supplying the inhabitants of the District with light, water and power. (Sec. 12, sub. 5.) How it shall exercise these powers and what contracts and agreements it shall make in so doing are matters which

the law has committed solely to the discretion and judgment of its Board of Directors.

Where Discretion is Committed to a Public Board the Courts Will Not Interfere With the Exercise of that Discretion.

The law is well settled and the authorities are uniform that where duties of a discretionary nature are conferred on public officers the Courts cannot in any way control or enjoin the exercise of such discretion in the absence of a showing of fraud, duress or collusion.

In the early case of

Goszler v. Corporation of Georgetown, 6 Wheaton 593, 5 Law. Ed. 339,

Mr. Chief Justice Marshall held that the constituted authorities of a municipal corporation may decide when and how the streets may be graded. He said (page 339 L. Ed.):

> "There can be no doubt that the power of graduating and leveling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves who elect the corporate body, and who may therefore be expected to consult the interests of the town."

In

City of East St. Louis v. United States etc., 110 U. S. 321, 28 L. Ed. 162,

at L. Ed. page 163 the Court said:

> "But the question, what expenditures are proper and necessary for the municipal admin-

> istration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it, for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

The test seems to be, is the act one which is discretionary. It is immaterial whether it be legislative or executive. The rule is thus stated in *High on Injunctions* (Section 1326), as follows:

> "The true test in all such cases is as to the nature of the specific act in question, rather than as to the general functions and duties of the officers. If the act which it is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer as distinguished from a merely ministerial duty, its performance will not be prevented by injunction."

This language is quoted with approval in the decision in

Glide v. Superior Court, 147 Cal. 21.

In that case in dealing with a matter of discretion committed to the board of supervisors of a county the court said:

> "We have said that no doubt can be entertained but that the jurisdiction over these matters is primarily vested with the board of supervisors, and that so long as the board is, as here, acting within the scope of its jurisdiction, judicial interference with its proceedings is improper and cannot be

tolerated. In confirmation of the views here expressed reference may be made to the case of *Rice v. Snider et al.* (No. 13,681, Circuit Court of the United States for the Ninth Judicial Circuit), where this precise question in this identical case was presented to Circuit Judge Hunt, in an effort to invoke the aid of the federal courts to restrain the supervisors of Yolo County in this very proceeding. Judge Hunt, in refusing the petition for an injunction, after setting forth the principle that courts will not interfere by an injunction with legislative action of a municipal corporation unless the proposed legislation is beyond the scope of the corporate power, and its passage would under the circumstances work an irreparable injury, declared that under the law it was the duty 'of the board of supervisors alone to ascertain the fact whether the land is or is not reclaimed, and thereafter to exercise a judgment and discretion as may be proper and expedient. To hold that the lands are reclaimed would be to pass upon the disputed facts of the case; it would not be proper at this time; it would in effect be to control the action of the board of supervisors by injunction. But, as said, the ascertainment of the fact rests with the board alone and does not affect their jurisdiction.' "

Judge Cooley says (Const. Lim. 3d Ed. page 168):

"The moment a court intervenes to substitute its own judgment for that of the legislature in any case where the Constitution has vested the legislature with power over the subject that moment it enters upon a field where it is impossible to set limits to its authority and where its discretion alone will measure the extent of its interference."

The foregoing authorities, particularly *High on Injunctions,* show that the test is not necessarily whether the act be legislative or executive but whether

it be an act in which discretion and judgment are conferred upon the officer exercising it, in other words, distinguishing the act from a mere ministerial duty. The acts of the board of directors of the utility district brought in question are not alone administrative or executive but are also legislative.

Nickerson v. San Bernardino Co., 179 Cal. 518.

In the course of its opinion the court said (page 522):

> "It is not necessary to enter into any extended discussion of this assigned error. The ruling of the court was clearly within a well-recognized principle of law controlling the power of courts with respect to the review of proceedings of municipal bodies acting in their legislative or *discretionary* capacities. When the legislature has committed to a municipal body the power to legislate on given subjects *or has committed to it judgment or discretion as to matters upon which it is authorized to act,* courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions. That the power conferred on the board of supervisors by law relative to the purchase of land for a hospital site, the erection of hospital buildings and their equipment, was both legislative and discretionary in character is not open to dispute. The law cast upon the board the duty of determining whether in its judgment the public necessity required that the county should acquire a new county hospital and conferred upon it the power necessary to accomplish this if it should so determine." (Emphasis ours.)

In re City and County of San Francisco, etc., 191 Cal. 172, 184,

was a case where the City and County of San Francisco sought to enter into a contract with the County

of Alameda for the care of tubercular patients. The court said (page 184):

> "The argument that the agreement is an improvident and unwise one for the City to make is one often heard in opposition to municipal contracts. It is effectually answered by a restatement of the rule that * * *"

and then follows the quotation from the *Nickerson* case last above quoted.

Further citation of authority is merely cumulative.

The matter is also covered by two Code sections. Section 3423 of the Civil Code reads as follows:

> "An injunction cannot be granted * * *
> Seventh. To prevent a legislative act by a municipal corporation."

Section 526, Subdivision 7, of the Code of Civil Procedure, contains the identical inhibition as that contained in the Civil Code.

Answering Appellant's Argument on This Point. (App. Br. pp. 14-50.)

We feel that the provisions of the Organic Act of the District and the authorities last cited by us effectually answer appellant. It is in order, however, to briefly comment on appellant's position and the authorities relied on by him to support it.

We have no particular quarrel with the holding of the cases cited by appellant in the discussion of this point on pages 20 to 30 and also on pages 44 and 45 of his opening brief. They are not at all in point. We concede that if a public board is placed in possession of public property to be used for public purposes

it cannot sell or dispose of such property contrary to the public good. For example, the City and County of San Francisco received a grant from the federal government to use certain lands for its Hetch Hetchy project in order to furnish a water supply and incidental electric power to its inhabitants. Obviously the Board of Supervisors of that city could not sell these rights to a public corporation or do any other similar act with reference thereto which would be a repudiation of their public trust. Such acts would be inconsistent with the responsibility and duties entailed upon them by virtue of their office. But on the other hand, if in order to get a water supply and a reservoir site, it was necessary to enter into contractual relations with the federal government (as the City and County of San Francisco did), which agreements contained forfeiture clauses, (as the Raker Act does) a much different situation presents itself. There in entering into such a agreement the public body is performing a duty consistent with its trust and is making the agreement which best appeals to it in order to accomplish a desired result and to manage the public business which is committed to its care.

In the instant case the license that the District has from the federal government can only be forfeited in the event that there is a violation of its terms. These terms are reasonable and we know of no rule of law which prevents a public body from entering into such agreements; certainly the cases cited by appellant do not so hold. It is one thing for a public board to do an act inconsistent with its powers and duties. It is quite another thing to perform an act

consistent with these powers. In the cases cited by appellant the public board generally was trying to evade its responsibility. Here the board is performing its duty in securing a water supply in the only way it can be secured. The United States has the land, the District needs it and the board is securing it in the manner provided by law. Its Organic Act contains no inhibition against such agreement. On the contrary it gives the board full power and discretion to freely lease and contract.

As a matter of fact appellant's entire argument is based upon the premise that any money spent for building a dam on these federal lands will be lost to the District. This is an unwarranted assumption. If the District observes the terms of its license it will enjoy the use of these federal lands for at least fifty years and perhaps forever. It will not be deprived of same even at that time without full compensation. The government must give reasonable notice if it intends to take over the project. (Fed. Water Pow. Act, Sec. 14.) Then again, the only part of the project that can be taken over will be that which has to do with the generation of electrical energy as the permit of the District is so limited by the Act. (Sec. 3.) Let us assume for the argument the worst possible situation from the standpoint of the District. Let us assume at the end of fifty years the government will take over the dams and the land and the power construction. Wherein does the District lose anything? Full compensation must then be made to the District for the property taken and full severance damages must be allowed. (Sec. 14.) Even if the

"project", that is, the power rights be taken by the government, the water will still be in the stream to be used by the District after it has gone through the power house; the pipe lines will still be there for conveying the water to the District; it may be a very profitable investment to use these lands as is contemplated for fifty years and then, even if they are taken over at that time, by some other system of works arrange to take the water to the District through some other means of diversion. On the other hand, the government may renew the license, as it is permitted to do by Sec. 15. Whether it does or does not do so is immaterial at this stage of the proceeding, because the entire matter is a question of business judgment committed to the Board of Directors of the District to determine how and when these various works shall be built and what agreements and contracts it shall make in so doing.

If counsel were right in their contentions no public service corporation, nor any political subdivision, could ever take a license under the Federal Water Power Act. It has been held that private public service corporations cannot dispose of their property in such a way as to impair the performance of their public trust. (The same argument that appellant makes with reference to a municipal corporation.)

Thompson on Corporations, 2nd Ed., Vol. 3, Sec. 2426, page 347; Section 2427, page 349;
Thomas v. West Jersey R. Co., 101 U. S. 71, 24 L. Ed. 950, 952.

If appellant is correct in his contention herein that the District because of its public trust is precluded

from taking such a license, then every permit from the federal government under the Federal Water Power Act to either any public corporation or to any private corporation acting as a public utility is likewise invalid. Such a conclusion would be absurd. It would mean practically no licenses at all could be granted because as this court well knows most of the power sites in this state contain government land and the business is in the hands of public utility corporations. The answer is that in taking such licenses such corporations and this district are furthering the purposes for which they were created.

Even without a provision in the Organic Act a public corporation may make any lease or agreement consistent with its purposes and rent facilities for distributing water for a limited time.

Beasley v. Assets Conservation Co., 230 Pac. 411, 413 (Wash.)

In that case an irrigation district without special authority except such as is necessarily implied in its organic act made a contract with a private corporation to procure water. In the course of its opinion the Supreme Court of Washington said:

> "We are satisfied that the contract is not ultra vires; that is, beyond the power of the district. Under our statutes (Rem. Code, Sec. 6416 et seq.), the ultimate purpose of an irrigation district is to procure water for the purpose of irrigating the lands within its boundaries. Generally this water is furnished by a distributing system owned by the district itself, but it is not necessarily confined to procuring water in that way. Its powers are not only such as are granted in express words, but also those necessarily or fairly implied in or inci-

> dent thereto, or indispensable to its declared objects and purposes. * * * *Almost any effort to procure water for irrigation purposes would be within the expressed or implied powers of an irrigation district.* The sole purpose of the contract involved here was to procure irrigating water. The district was undertaking to procure a system of its own. During the interim it was securing the water in any way it could. To hold that an irrigation district has no power to make this contract would be to deprive it of the power of self preservation." (Emphasis ours.)

If appellant were to prevail, the agreement made by the City of San Francisco and construed in

> *In re City and County of San Francisco,* 191 Cal. 172, 184,

and upheld by the Supreme Court of this state would be invalid.

In taking this license the Board of Directors of the District has acted on but one of the many matters of business judgment and discretion which have been committed to their care. They are in no different situation with respect to this matter than they were in their original determination to go to the Mokelumne River for a source of supply. If instead of going to the Mokelumne they had gone to the Calaveras or the Stanislaus or the Tuolumne or some other stream, could this appellant or any other taxpayer of the District successfully maintain an action in the courts to compel them to go to the Mokelumne? The answer of the court under such circumstances would be sweeping and it would be that the matter was one that had been committed by law to the chosen agents of the people

as represented in the Board of Directors of the District; that on a matter committed to their discretion their judgment is final. There is really no difference in principle between the discretion given the board in the supposed case and their discretion in the matter under review in this case.

CONCLUSION.

The tremendous importance of this matter to the District and its inhabitants is so apparent that it needs no statement; aside from the monetary loss of the many millions of dollars already invested, the danger to the health and comfort of the community and the effect of an adverse decision on the future of the District, cannot be overstated. We feel under all the circumstances that the judgment of the lower court should be approved on each of the grounds herein discussed.

Dated, Oakland,
November 10, 1926.

Respectfully submitted,

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